No. 73-1573

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,

Appellants,

vs.

DUANE LARKIN, M.D.,

Appellee.

On Appeal from the United States District Court for the Eastern District of Wisconsin.

BRIEF OF APPELLEE

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INDEX

AUTHORITIES CITED

Cases

Statutes

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BRIEF OF APPELLEE

THE STATE OF WISCONSIN STATUTES INVOLVED

§ 448.02 (1)

No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or

osteopathy, or any other system of treating the sick as the term "treat the sick" is defined in s. 445.01 (1) (a), without a license or certificate of registration from the examining board, except as otherwise specifically provided by statute.

§ 448.02 (4)

No person shall practice medicine, surgery or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice in this or any other state, in any instance in which the examining board, after a hearing, finds that practicing under such changed name operates to unfairly compete with another practitioner or to mislead the public as to identity or to otherwise result in detriment to the profession or the public. This subsection does not apply to a change of name resulting from marriage or divorce.

§ 448.16 (1)

Sections 448.02 to 448.08, shall not apply to commissioned physicians of the medical corps of one of the armed services or the federal health service of the United States or to medical or osteopathic physicians of other states or countries in actual consultation with resident licensed practitioners of this state, nor to the gratuitous prescribing and administering of family remedies or to treatment rendered in an emergency.

§ 448.17

The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s. 448.06, that are inimical to the

public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof.

§ 448.18 (1)

"Immoral or unprofessional conduct" as used in this section mean: (a) Procuring, aiding or abetting a criminal abortion; (b) advertising in any manner either in his own name or under the name of another person or concern, actual or pretended, in any newspaper, pamphlet, circular, or other written or printed paper or document the curing of venereal diseases, the restoration of "lost manhood", the treatment and curing of private diseases peculiar to men or women, or the advertising or holding himself out to the public in any manner as a specialist in diseases of the sexual organs, or diseases caused by sexual weakness, self-abuse or excessive indulgences, or in any diseases of a like nature or produced by a like cause, or the advertising of any medicine or any means whatever whereby the monthly periods of women can be regulated or the menses reestablished, if suppressed, or being employed by or in the service of any person, or concern, actual or pretended so advertising; (c) the obtaining of any fee; or offering to accept a fee on the assurance or promise that a manifestly incurable disease can be or will be permanently cured; (d) wilfully betraying a professional secret; (e) indulging in the drug habit; (f) conviction of an offense involving moral turpitude; (g) engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public.

§ 448.18 (2)

(2) Upon verified complaint in writing to the district attorney charging the holder of a license or certificate of registration from the examining board or chiropractic examining board with having been guilty of immoral or unprofessional conduct or with having procured his certificate or license by fraud or perjury, or through error, the district attorney shall bring civil action in the circuit court against the holder and in the name of the state as plaintiff to revoke the license or certificate. The court may appoint counsel to assist the district attorney and either party may demand a jury. No one shall be privileged from testifying fully or producing evidence, but he shall not be prosecuted or subject to penalty on account of anything about which he so does, except for perjury in so doing. If the court or the jury finds for the plaintiff, judgment shall be rendered revoking or suspending the license or certificate and the clerk of the court shall file a certified copy of the judgment with the examining board or the chiropractic examining board. The costs shall be paid by the county, but if the court determines that the complaint made to the district attorney was wilful and malicious and without probable cause, it shall enter judgment against the person making the complaint for the costs of the action, and payment of the same may be enforced by execution against the body as in tort actions.

(3) When any person licensed or registered by the examining board is convicted of a crime committed in the course of his professional conduct, the clerk of the court shall file with the examining board a certified copy of the information and of the verdict and judgment, and upon such filing the examining board shall revoke or suspend the license or certificate. The examining board

shall also revoke or suspend any such license or certificate upon satisfactory proof being made of the conviction of such license or certificate holder in a federal court of a crime committed in the course of his professional conduct. The action of the examining board in revoking or suspending such license or certificate may be reviewed ch. 227.

§ 448.18 (7)

(7) A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub. (1). The examining board shall not have authority to suspend a license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. All examining board actions under this subsection shall be subject to review under ch. 227.

§ 448.23 (1)

448.23 Fee splitting between physicians and others.

(1) SEPARATE BILLING REQUIRED. Any physician who renders any medical or surgical service or assistance whatever, or gives any medical, surgical or any similar advice or assistance whatever to any patient, physician, corporation, or to any other institution or organization of any kind, including a hospital, for which a charge is made to such patient receiving such service, advice or assistance, shall render an individual statement or account of his charges therefor directly to such patient, distinct and

separate from any statement or account by any physician or other person, who has rendered or who may render any medical, surgical or any similar service whatever, or who has given or may give any medical, surgical or similar advice or assistance to such patient, physician, corporation, or to any other institution or organization of any kind, including a hospital.

§ 448.23 (2)

(2) PHYSICIAN PARTNERSHIP PERMITTED. Notwithstanding any other provision in this section, it is lawful for 2 or more physicians, who have entered into a bona fide partnership for the practice of medicine, to render a single bill for such services in the name of such partnership.

QUESTION PRESENTED FOR REVIEW

Did the United States District Court for the Eastern District of Wisconsin abuse its discretion when, sitting as a three-judge court, it entered an interlocutory injunction preventing the appellants from engaging in a hearing to suspend the license of the appellee to practice medicine in the State of Wisconsin for six (6) months when the persons who would be the judges at the hearing were the very same persons who personally investigated the charges and had determined that the appellee had violated some laws regulating medicine and that there was probable cause to believe that the appellee had violated the provisions of the laws regulating the medical practice in Wisconsin, thus making the appellants the judges of the charges which they had investigated and brought?

STATEMENT OF THE CASE

Although this case on paper commenced on July 6, 1973, it has its genesis in the stormy litigation in Wisconsin surrounding the practice of abortion.

In 1970, a three-judge court sitting in the Eastern District of Wisconsin declared the Wisconsin abortion statute unconstitutional. *Babbitz* v. *McCann*, 310 F.Supp. 293 (E. D. Wis. 1970), vac. on other grounds, 402 U.S. 903 (1971). That decision triggered a wave of resistance and a concerted effort by the Attorney General of Wisconsin, the District Attorney in Milwaukee county, the District Attorney in Dane County (Madison) and these appellants to defy the decision of the United States District Court by threatening all members of the medical profession who engaged in the practice of abortion. The officials of the State of Wisconsin were so successful in their effort that only two doctors engaged in administering abortions in a public manner, Dr. Alfred Kennan in Madison, Wisconsin and Dr. Duane Larkin, the appellee here, in Milwaukee, Wisconsin. The litigation surrounding Dr. Kennan was first to follow the *Babbitz* decision.[1]

Initially the District Attorney of Dane County, Mr. Nichol, commenced a criminal action against Dr. Kennan. That action was thwarted by the United States District Court for the Western District of Wisconsin and subsequently by a three-judge court sitting there. *Kennan* v. *Nichol*, 326 F.Supp. 613 (1971) *aff'd.*, 404 U.S. 1055 (1971). However, the authorities of Wisconsin were not persuaded to abate their conduct as a result of the decision in the

[1] The complaint and amended complaint incorporated by reference the entire files of *Larkin* v. *McCann, et al.*, 71-C-671 and *Kennan* v. *Warren, et al.*, 71-C-132, A. 9, 10, 20, 21, ¶¶ 14, 22.

Madison case. The Attorney General in concert with these appellants, commenced an action against Dr. Kennan which threatened his license to practice medicine. Again, the federal court in Madison, Wisconsin restrained those activities. See *Kennan* v. *Warren*, 328 F.Supp. 525 (1971). Finally, a circuit court judge in Dane County proceeded on his own to attempt to stop Dr. Kennan and that judge had to be restrained by Judge Doyle. *Ibid.*

The history of the litigation in Milwaukee with respect to Dr. Larkin is similar. However, most of his cases are not reported. In December of 1971, Judge Myron L. Gordon entered a restraining order preventing enforcement of the Wisconsin abortion statute against Dr. Larkin. *Larkin* v. *McCann, et al.*, No. 71-C-671 (E.D. Wis.). While the motion for a preliminary injunction was pending, the Attorney General of Wisconsin commenced an action in Madison, Wisconsin against Dr. Larkin for declaratory relief and obtained abatement of the federal court proceedings pursuant to 28 U.S.C. § 2284(5). The litigation continued there until the entry of Mary Carpenter Bruce. Mrs. Bruce commenced an action in the Circuit Court of Milwaukee, Wisconsin against Dr. Larkin to abate a public nuisance. During the course of those proceedings, which were removed to federal court and then remanded back to the state court,[2] Mrs. Bruce was successful in obtaining a restraining order from a Circuit Court judge. Dr. Larkin commenced an action in the federal court against this Circuit judge and, during the pendency of that action, the Circuit judge withdrew his restraining order. Dr. Larkin also commenced an action in the federal court against Mary Carpenter Bruce, and

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[2] *State ex rel. Bruce* v. *Larkin*, 346 F. Supp. 1065 (E.D. Wis. 1972).

Judge Myron Gordon held that that case stated a cause of action. See *Larkin* v. *Bruce*, 352 F.Supp. 1076 (E.D. Wis. 1972). Thus, in both Madison and Milwaukee, the two abortion clinics were hounded by the Attorney General, the local District Attorney, and a local state Circuit Court judge. At the time of the abortion decisions of the United States Supreme Court,[3] the only group who had not participated in Milwaukee who had participated in Madison was the State Medical Examining Board, the appellants in this case. They went after Dr. Larkin after the abortion decisions of the United States Supreme Court.

On June 20, 1973, the appellant, Thomas W. Tormey, Jr., M.D., acting on behalf of all of the other appellants, executed a Notice of Investigative Hearing which stated that the Board would "determine whether [Dr. Larkin] has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine, and whether he has engaged in conduct detrimental to the best interests of the public." The Notice stated further:

> "Based on the evidence adduced at said investigative hearing the Medical Examining Board will determine whether to warn or reprimand if it finds such practice and whether to institute criminal action or action to revoke license if probable cause therefor exists under criminal or revocation statutes."

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[3] *Doe* v. *Bolton*, 410 U.S. 179 (1973); *Roe* v. *Wade*, 410 U.S. 113 (1973).

Service was attempted upon the appellee.[4] Shortly after receiving a copy of the Notice, Dr. Larkin commenced this action in the United States District Court for the Eastern District of Wisconsin. A Motion for a Temporary Restraining Order was filed (A. 16) and this investigative hearing commenced on July 12, 1973. On that same date, Dr. Larkin filed an Amended Complaint (A. 18-24). In the Second Cause of Action, Dr. Larkin challenged the constitutional validity of the Wisconsin statutory scheme in Paragraphs 2 and 3 as follows:

> "2. The proceedings of the Medical Examining Board as instituted against the plaintiff and as authorized by Chapter 448, Wis. Stats., a copy of which is attached hereto as Exhibit D, are unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution in that:
>
> (a) The phrases 'inimical to the public health', 'conduct unbecoming a person licensed to practice medicine' and 'conduct detrimental to the best interests of the public' are vague, overly broad and cause men of reasonable intelligence to guess as to their meaning and effect thereby

[4] Dr. Larkin has never been served with any documents by personal service. Sec. 227.08, Wis. Stats. authorizes agencies to adopt rules for the service of notices and for the conduct of all of its hearings. The Medical Examining Board has never promulgated any rules whatsoever to govern the proceedings involved in this case. Thus, there is no provision within the regulatory agency involved for substituted service of any nature. Paragraph 2(c) of the Second Cause of Action of the Amended Complaint alleges the constitutional deprivation due to the fact that the Board does not have any rules. A. 22.

depriving the plaintiff of notice of prohibited practices as well as providing the defendants with authority to investigate and warn, reprimand or institute criminal actions for activities of the plaintiff which are protected by the Constitution of the United States of America.

(b) The Notice of Investigative Hearing, Exhibit B, states that at the conclusion of the hearing the Board will determine whether to warn or reprimand the plaintiff or whether the Board will institute criminal actions or actions to revoke license if they conclude that probable cause exists and, said notice prohibits the plaintiff and his attorney from cross examining any of the witnesses against him and from in any way appearing in these hearings in a meaningful fashion thereby subjecting the plaintiff to punishment and official condemnation without being afforded his right to be confronted by the witnesses against him, without being afforded his right to notice of the nature of the charges against him, without being afforded the opportunity to produce witnesses on his behalf, without being afforded the compulsory process for witnesses, and without being afforded a trial by jury or by persons other than his accusers, all in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(c) The Medical Examining Board of the State of Wisconsin has not promulgated any rules with respect to the conduct of these proceedings. Thus, the proceedings will be regulated on an *ad hoc* basis in violation of due process of law because there are no rules to determine what process is due the plaintiff.

(d) The Notice of Investigative Hearing states that a criminal action will be brought against the plaintiff if the Board finds probable cause under the criminal statutes of the State of Wisconsin. This proceeding denies to the plaintiff the right to have a determination of probable cause made by an impartial, neutral, independent and detached judicial officer or by a grand jury, in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. These proceedings as embodied in the Notice of Investigative Hearing are brought pursuant to authority which appears in Sec. 448.17 and *448.18*, Wis. Stats. These statutes authorize the Board to warn, reprimand, determine probable cause, *suspend a license*, and *temporarily suspend a license* and, such statutory scheme is in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution as more particularly set forth in the preceding paragraph." (Emphasis supplied). A. 21-23).

The Amended Complaint in its request for relief at ¶5 asked for a Temporary Restraining Order and a Preliminary Injunction in the case. (A. 24).

At the time of the filing of the Amended Complaint, the appellants were only investigating the appellee and, on each and every occasion where they had an opportunity to do so, they assured the United States District Court for the Eastern District of Wisconsin that any effort to remove the license of Dr. Larkin, either permanently or temporarily, would only be done in a judicial proceeding and would not be done by these appellants. The counsel for the appellants repeatedly compared the activities of the appellants to a grand jury. Appellants' Memorandum

Brief in Support of Motion to Dismiss, 7/11/73, Document No. 7, p. 3; Memorandum Brief in Support of Amended Motion to Dismiss, 7/27/73, Document No. 38, p. 9; Reply Brief in Support of Amended Motion to Dismiss, 8/13/73, Document No. 41, pp. 1-3.

At Page 1 of the appellants' Reply Brief in support of their Amended Motions to Dismiss, the appellants stated the following:

> "The Medical Examining Board is not authorized to indict, but must go to the District Attorney to seek prosecution or action to revoke *or suspend* the license of one of its licensees." (Emphasis supplied). (Document 41).[5]

At Page 3 of the same brief, the appellants made the following statement to the federal court:

> "The obvious distinction is that in the present case the Medical Examining Board is conducting an investigative hearing and not a contested hearing. *Any contested hearing will be held before a court and/or jury.*" (Emphasis supplied). (Document 41).

At Pages 5 and 6 of that same brief, the appellants stated that any revocation proceeding would be "steeped in due process provisions." *Ibid.*

In that posture and with those assurances regarding the procedure being employed against Dr. Larkin, the United States District Court for the Eastern District of Wisconsin repeatedly denied requests for preliminary injunctive relief.

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[5] These documents were not printed in the Appendix in violation of the court rules, even though reproduction was demanded by the appellee. The appellee believes that a full examination of the representations made to the trial court by counsel for the appellants is necessary to appreciate the situation presented by the appellants to the trial court. Counsel for the appellants below also serves officially as counsel to the appellants in their day to day business.

The proceedings against Dr. Larkin with respect to the so-called investigative hearing were held on July 12 and 13, 1973, and were continued on October 4, 1973. Between July 13, 1973 and October 4, 1973, and, on September 18, 1973, the appellants, acting pursuant to Sec. 448.18 (7), Wis. Stats., completely changed their posture and issued a Notice of Contested Hearing against Dr. Larkin. (A. 45-46). The Board scheduled the contested hearing for the afternoon of October 4, 1973. Thus, the contested hearing was directed to take place at the conclusion of the investigative hearing. The issues involved in the contested hearing were identical to the issues which had been investigated by the Board. They were connected with:

1. Whether Dr. Larkin practiced medicine under a different name than the one which appears on his license;
2. Whether Dr. Larkin allowed an unlicensed physician to practice medicine at his clinic; and
3. Whether Dr. Larkin split fees with other persons.[6]

On September 20, 1973, the appellee filed a copy of the Notice of Contested Hearing with the United States District Court with an accompanying letter. In that letter, the appellee stated the following:

> "The present posture of the proceedings is a classic example of violations of due process of law. The so-called investigation was conducted by the defendants. Before that investigation is completed, the same defendants bring charges against the plaintiff and are his accusers. The judge and jury of the charges are the same people who preferred them. At the conclu-

[6] This Notice of Contested Hearing was served in the same improper manner as the original Notice.

sion of the hearing, his accusers and judges will then pass sentence upon him. Thus, the procedure violates most known tenets of due process of law. (Citing cases).

"We now ask the court for an immediate restraining order to prevent irreparable harm which is being threatened against Dr. Larkin in violation of the constitution of the United States." (Document No. 44).[7]

On September 26, 1973, the appellee filed another Motion for Temporary Restraining Order and Interlocutory Injunction. (A. 46-47). That Motion focused upon the contested hearing which was scheduled to commence on October 4, 1973 and incorporated as grounds the positions "more fully set forth in the affidavits and briefs previously filed herein." The letter accompanying the Motion to Judge Gordon, a copy of which was sent to counsel for the appellants, stated the following:

"Enclosed is a Motion for Temporary Restraining Order and Interlocutory Injunction which specifically focuses upon the latest maneuver by the defendants whereby they are attempting to suspend Dr. Larkin's license pursuant to the provisions of Sec. 448.18(7), Wis. Stats. The Amended Complaint in the case generally challenged the validity of Sec. 448.18, and Paragraph 2(b) in conjunction with Paragraph 3 of the Second Cause of Action specifically challenged the constitutionality of the Board to invoke Sec. 448.18(7) to temporarily suspend the license without being afforded a trial by jury or by persons other than his accusers, *inter alia.*" (Document No. 45).

[7] This document was not printed in the appendix although a request for printing was made. See FN 5, *supra.*

In a decision dated October 1, 1973, the Honorable Myron L. Gordon ordered the entry of a Temporary Restraining Order. (A. 47-53). The court detailed the history of the proceedings and noted that the action by the Board in pursuing a contested hearing changed the proceedings "radically". The court summed up the situation which it was facing as follows:

> "The plaintiff, a licensed physician who performs abortions in this state, brought this action against the members of the state medical examining board for injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343.
>
> "The complaint alleged that an investigative hearing had been initiated concerning Dr. Larkin, but that the notice thereof failed to disclose any specific allegations of misconduct. It was further alleged, upon information and belief, that the investigation was launched in order to punish the plaintiff for performing abortions.
>
> "A motion for a temporary restraining order, filed with the complaint, was denied. I concluded that the plaintiff's complaint was insufficient to justify interference with the examining board's attempt to perform its statutory investigative duty. The plaintiff was given the opportunity, however, to submit memoranda with respect to his motion for a preliminary injunction.
>
> "Following a motion to dismiss filed by the defendants, the plaintiff amended his complaint to challenge the constitutionality of the statutes authorizing the examining board to act. A request to convene a three-judge court and a motion for a temporary restraining order or preliminary injunction were also filed. The defendants amended their motion to dismiss so as to make it applicable to the amended complaint.

"The plaintiff's motion for a temporary restraining order was again denied. Although I believed then, as I do now, that there is a serious question as to the validity of legislation which allows an examining board both to rule on *and* to punish for charges evolving from its own investigation, that question was not presented at that time. The challenge was only to the activity then being engaged in by the board, which was investigation.

"Again, however, the plaintiff was given the opportunity to submit authorities in support of his position, and the defendants were allowed to brief the motion to dismiss. It was anticipated that the arguments presented by the parties would also be helpful toward resolving the question of whether a three-judge court was required.

"Since that time, the status of this action has changed radically. The board is no longer engaged in an investigative proceeding, for it has notified the plaintiff that it has scheduled a 'contested hearing' at which it will determine whether his license should be temporarily suspended. The board's current action makes all allegations of the plaintiff's amended complaint germane. The positions of the parties can no longer be assessed in terms of a limited challenge involving only investigative proceedings; the board's present action calls into play all challenges to the statutory scheme as detailed in the plaintiff's complaint." *Larkin* v. *Withrow*, 368 F.Supp. 793, 794 (E.D. Wis. 1973). (A. 48-49).

The appellants, in response to this order of Judge Gordon, did not proceed with their contested hearing. However, the appellants proposed to continue with their investigative hearing on October 4, 1973. On October 3, 1973, the appellee attempted to obtain a Temporary Restraining Order against the continuation of the investigative hearing. (A. 53). This motion was denied by Judge

Gordon. See docket entry in connection with Document No. 21. Thus, even though the contested hearing had been suspended, the appellants chose to continue their investigative hearing on October 4, 1973. They concluded that hearing on that date, and on October 5, 1973, the appellants issued Findings of Fact and Conclusions of Law. Those findings and conclusions resolve every issue presented in the Notice of Contested Hearing against the appellee, Dr. Larkin. (A. 56-60).

The Board in its Findings of Fact concluded that Dr. Larkin practiced medicine under a different name than the one which appears on his license.. Findings (3), A. 57. The Board concluded that Dr. Larkin allowed an unlicensed physician to practice medicine at his clinic. Findings (4) (b), (c) and (6), (A. 57, 58.) The Board also found that Dr. Larkin split fees with other persons. Findings (7), A. 58. The Board went on to make conclusions of law that Dr. Larkin in practicing medicine under a different name, in allowing an unlicensed physician to practice medicine and in splitting fees with other persons had engaged in conduct detrimental to the best interests of the public and conduct unbecoming a person licensed to practice medicine, and thereby concluded that there was probable cause for an action to revoke the license of Dr. Larkin and probable cause for criminal proceedings. The matter was referred to the District Attorney of Milwaukee County for further action.

Subsequently, on November 9, 1973 the three-judge court met and announced from the bench that the Motion for a Preliminary Injunction would be granted. In lieu of Findings of Fact and Conclusions of Law, the three-judge court issued a written decision dated December 21, 1973. *Larkin v. Withrow*, 368 F.Supp. 796 (E.D. Wis. 1973). A. to Juris.

Statement, 2-4. In that decision, the three-judge court stated that the loss to a physician of his right to practice medicine constitutes a loss of his liberty or property. Furthermore, such a person is entitled to procedural due process because of the "significant interference with his property rights or his liberty." *Id.* at p. 797. The court stated:

> "In our view, the interference with a physician's ability to practice his profession qualifies as an interference with a property right. It is certainly 'a sufficient threat of personal detriment.' Doe v. Bolton, 410 U.S. 179, 188 (1973)." *Ibid.*

The court went on to state that the suspension of a license to practice medicine "presumptively has a serious adverse affect on the physician's reputation. Thus, it is clear that the plaintiff's liberty is also at stake." *Ibid.* In that language, the court demonstrated its position that there would be irrevocable injury to the appellee. The court noted that there was no exhaustion available in the state courts in the following language:

> "It is true that any action taken by the board pursuant to Sec. 448.18(7) is subject to judicial review under Sec. 227, Wis. Stats. (1971). However, that review statute goes only to the propriety of the board's *exercise* of statutory authority. We found that the very statutory authority *empowering* the board to act in the first instance was itself unconstitutional." (Emphasis, the court's). *Id.* at p. 798.

The appellants appeal the entry of this interlocutory judgment to the United States Supreme Court.

Subsequent to the appeal and on July 5, 1974 the appellants filed a motion to modify the injunction. Document S-1. In the affidavit accompanying the motion, a member of the Board and one of the appellants, Dr. John W. Rupel,

stated that the Board has modified its procedures in accordance with the decision in this case whereby one member of the Board engages in the investigative aspects of a case and presents his conclusions to the remainder of the Board for review. Thus, the Board has ostensibly separated its investigative and adjudicative functions. Dr. Rupel also stated that the Board wished to suspend three persons rather than seek revocation because those three persons were either addicted to drugs or alcoholics and their diseases severely affected their ability to practice medicine. As part of the rehabilitation program, it was the desire of the Board to merely suspend the licenses rather than seek revocation so that the persons involved would have an opportunity to readjust their lives to the point where they would no longer threaten the health care provided to the community.[8] In response to a cross motion by the appellee to modify the injunction, Document No. S-2, the trial court on July 25, 1974 modified the judgment to read as follows:

> "It is ordered and adjudged that the preliminary injunction and judgment dated January 31, 1974, be and hereby is modified, pursuant to Rule 62(c), Federal Rules of Civil Procedure, so that said judgment reads as follows:

---

[8] None of the charges leveled against Dr. Larkin at any time questioned his ability to practice medicine, his competency, or the quality of medical services provided at his clinic. Throughout the investigative hearings, Dr. Larkin complained about the notoriety of his case during the "secret" proceedings. See affidavits in support of motions for temporary restraining orders and preliminary injunctions. A. 15, 26-29, 38-43. The names of the drug addicted and alcoholic doctors who present threats to the health care of the community, according to the affidavit of Dr. Rupel, have not been released publicly during the course of those investigations.

IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success." Document No. S-5.

On July 26, 1974, the appellee mailed a suggestion of mootness or in the alternative motion to reconsider appellee's motion to dismiss or affirm. This suggestion and motion were pending when this brief was written.

ARGUMENT

DUE PROCESS OF LAW IS VIOLATED WHEN THE SAME PERSONS WITHIN AN ADMINISTRATIVE AGENCY PROPOSE TO BE THE JUDGES OF CHARGES WHICH THEY HAVE PREFERRED AFTER AN EXTENSIVE INVESTIGATION, SIMILAR TO AN INVESTIGATION MADE BY A GRAND JURY, AND AFTER THEY HAVE UNANIMOUSLY CONCLUDED THAT PROBABLE CAUSE EXISTS FOR PROSECUTION OF THE PERSON UNDER INVESTIGATION AND HAVE UNANIMOUSLY CONCLUDED EACH AND EVERY ISSUE TO THE POINT WHERE THEY HAVE MADE FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT HIS LICENSE SHOULD BE REVOKED.

This case involves the procedural due process which must be provided to a doctor licensed to practice medicine. Succinctly stated, the issue is whether procedural due process is violated when the same persons who investigated and brought charges against a doctor can be the judges of those charges for purposes of suspending a doctor's license for six months.[9]

[9] This case is not concerned with the mixing of functions within the same administrative agency. As the court well knows, most agencies have segregated functions for investigation, prosecution and adjudication. Within those functions, some agencies have some minor mixing of functions. The appellants' brief at 22-43, attempts to confuse this case with such a factual situation. However, the Wisconsin Medical Examining Board had no segregation of functions. The very same persons who investigated and accused Dr. Larkin were prepared to judge him until enjoined by the District Court.

This case presents more than some minor mixing of accusatorial and adjudicatorial functions by persons within an administrative agency. This case presents a factual situation where the Board conducted a full and complete investigation and had concluded in an *ex parte* hearing that Dr. Larkin had violated the law and that his license to practice medicine should be revoked. Then, these same Board members proposed to be the judge of their own accusation in a so-called contested hearing. There is no support in the settled law of the United States for such bias on the part of administrative boards.[10]

The operative facts which were relied upon by the District Court are uncontested. They are as follows:

1. The appellants investigated Dr. Larkin in an *ex parte* hearing; (A. 13-14, 20, 26-29, 35-37, 60)
2. At the conclusion of this investigative hearing, the appellants made Findings of Fact and Conclusions of Law which resolved the factual issues in the case; (A. 56-60)
3. The appellants in those Findings of Fact and Conclusions of Law transmitted to the District Attorney of Milwaukee County, Wisconsin a recommendation and finding of probable cause that criminal and civil forfeiture of license proceedings be commenced against Dr. Larkin; (A. 56-60)

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[10] The reliance of the appellants on *Richardson* v. *Perales*, 402 U.S. 389 (1971) in their brief at 27 is misplaced. In *Perales*, the hearing examiner was not an accuser. Although he had some investigative functions, the end product was not an accusation or exoneration. His role was to determine facts of injury in a social security context and he was empowered to obtain independent medical examinations similar to a court obtaining independent medical testimony in an insanity case.

4. The appellants proposed by a Notice of Contested Hearing to try Dr. Larkin upon charges which were identical to the findings which had previously been made and, at the conclusion of that so-called contested hearing to decide whether to suspend Dr. Larkin's license to practice medicine for a period of up to six months; (A. 45-46; Sec. 448.18 (7), Wis. Stats.)

5. The Statutory scheme of the State of Wisconsin contained in Chapter 448 authorizes such proceedings;

6. None of the charges brought against Dr. Larkin at any time challenged his qualifications as a physician to practice medicine in the State of Wisconsin and none of the allegations against him even remotely suggests that he is incompetent to practice medicine in the State of Wisconsin or that his clinic has in any way injured any citizen of the State of Wisconsin due to lack of proper medical treatment. (A. 45-46, 56-60)

The issue is whether the trial court abused its discretion in entering a preliminary injunction when faced with this factual situation.

There is no doubt that a person whose medical license is about to be suspended or revoked is entitled to due process of law.[11] A citizen of the United States has a vested right to pursue the common occupations of life and this right can be protected by a federal civil rights proceeding. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) and *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972). Suspension or revocation of a right to practice a profession is comparable to a criminal proceeding. *In Re Ruffalo*, 390 U.S. 544, 550-

[11] The brief of the appellants concedes that due process of law must be afforded to the appellee. A. brief 22-43.

551 (1968). Thus, the due process rights which attach to such a proceeding must be given careful scrutiny.[12]

In this case, the due process right which was about to be denied to Dr. Larkin was his right to be judged by an unbiased decision maker. The appellants here were biased as a matter of law because they had extensively investigated Dr. Larkin and had become his accusers prior to the entry of the preliminary injunction in this case. When Dr. Larkin was attempting to restrain the investigation being conducted by this Board, counsel for the Board repeatedly compared the work of the Board as being similar to a grand jury investigation. At the conclusion of this investigation, the grand jurors proposed to become the judges of their charges for purposes of suspending Dr. Larkin's license to practice medicine for a period of up to six months. It was at that stage that the trial court properly stepped in and halted these suspension proceedings. In *In Re Murchison*, 349 U.S. 133 (1955), this Court observed that no state has ever forced a defendant to accept grand jurors as his trial jurors. In unmistakably clear language, this court stated the fundamental due process right as follows:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on

[12] The appellants in their brief at 39 suggest that the right to practice medicine is a privilege and that, therefore, less due process can attach to revocation proceedings. However, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege' ". *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971). See also *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

> charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatorial process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Id.* at 137.

See also *Offutt* v. *United States*, 348 U.S. 11 (1954) and *Bloom* v. *Illinois*, 391 U.S. 194, 202 (1968). This elemental due process admonition which is applicable to judges and juries is equally applicable to administrative agencies which try to revoke and suspend the license of a doctor to practice medicine.

This court has not retreated from the admonition of *Murchison*. In *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), this Court overturned the dismissal of a school teacher who had made critical remarks against his Board of Education. It was that same Board of Education which tried this teacher. The issue regarding mixing of functions was raised for the first time on appeal. This Court commented on that issue in the following manner:

> "Appellant requests us to reverse the state courts' decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case.

> *On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a-vis appellant.* Compare Tumey v. Ohio, 273 U.S. 510 (1927); In Re Murchison, 349 U.S. 133 (1955). Accordingly, since the state courts have at no time given de novo consideration to the statements in the letter, we feel free to examine the evidence in this case completely independently and to afford little weight to the factual determinations made by the Board." 391 U.S. at 578. (Emphasis supplied).

Indeed, the United States Court of Appeals for the Second Circuit in a case involving the expulsion of a cadet from the Merchant Marines Academy stated the obvious proposition of law as follows:

> "It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement renders impartiality most difficult to maintain." *Wasson* v. *Trowbridge*, 382 F.2d 807, 813 (2nd Cir. 1967).

In revocation of parole or probation, one of the minimum protections of due process of law found by this Court is "an independent decision maker." The decision on the merits of the allegations against a parolee or a probationer as well as the decision on the punishment to be imposed must be made by someone other than the person who brings the charges. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli*, 411 U.S. 778, 786 (1973).

The appellants argue that Dr. Larkin could have easily obtained a *post hoc* fair hearing before an independent decision maker. Appellants' brief at 34. However, the three-judge court pointed out that there was no effective administrative remedy available because the appeal only determines the propriety of the exercise of the statutory authority of the Board. In this case, the court concluded that

the Board itself was improperly constituted. Thus, the appeal is meaningless because the reviewing court would only determine whether there was sufficient evidence to support the findings of the Board, were they allowed to proceed. *Hilboldt* v. *Wis. R. E. Brokers' Bd.*, 28 Wis.2d 474, 482, 137 N.W.2d 482 (1965). The nature of the challenge here is that the Board was biased, and that their findings could not be anything more than a reflection of their bias.[13] This Court stated in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973):

> "In the instant case the matter of exhaustion of administrative remedies need not detain us long. Nor-

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[13] Although the merits of the charges against Dr. Larkin are not at issue at this time, the fact of the matter is that Dr. Larkin has legal and factual defenses to the charges. Section 448.02 (4), Wis. Stats. does not prohibit practicing under a false name. That statute prohibits practicing under a false name after the Board makes a finding, after a hearing "that practicing under such changed name operates to unfairly compete with another practitioner or to mislead the public as to identity or to otherwise result in detriment to the profession or the public." The statutory history shows that the Statutes of Wisconsin originally enacted an absolute prohibition against doctors using assumed names. That absolute prohibition was modified by the language quoted above. See History of Sec. 448.02 in Wis. Stats. Annot.

There is no statute prohibiting soliciting patients by means of agents. Indeed, Sec. 448.18 (1)(b) prohibits advertising with respect to venereal diseases and lost manhood or womanhood. No other prohibition against advertising has been found in Chapter 448. Presumably, other forms of advertising are not prohibited in Wisconsin.

Although Sec. 448.02 (1) prohibits the practice of medicine without a license, that statute contains exceptions. Section 448.16, Wis. Stats. states that medical physicians of other states or countries in consultation with resident licensed practitioners do not have to be

mally when a state has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is con-

(Footnote continued)

licensed by the State of Wisconsin. See 1927 Op. of the A.G. of Wisconsin 702, where the Attorney General held that an Illinois physician was not required to obtain a Wisconsin license to practice medicine in Wisconsin in the office of a doctor who was licensed in Wisconsin. Dr. Young Whan Ahn was licensed to practice medicine in the State of Georgia in the fall of 1972, and, upon information and belief was licensed to practice medicine at all times pertinent in the Republic of South Korea. Also, a license is not required for treatment rendered in an emergency. "Emergency" has not been defined by cases in Wisconsin. It is a matter of public record that the Medical Examining Board, in conjunction with the Attorney General and the District Attorney of Milwaukee County threatened the medical profession with punishment if any engaged in the practice of administering abortions in violation of Sec. 940.04, Wis. Stats. They were so successful in their intimidation that only Dr. Kennan and Larkin regularly performed abortions in their clinics under protection of the federal courts. Thus, women in need of medical treatment and entitled under the law of medical treatment were turned away by most doctors because of the public threats of these public officials. These same public officials here sought to investigate Dr. Larkin to pass judgment upon his response to the medical emergency which they illegally created.

The so-called fee splitting section, Sec. 448.23 (1), Wis. Stats. is very limited in scope. The statute compels physicians to render an individual statement for his charges even though the physician is working for some institution or organization. The statute does not prohibit a doctor from paying another person money for any reason whatsoever.

The appellants have disqualified themselves from resolving these factual controversies because they were the investigators of Dr. Larkin and, at the time of the entry of the Preliminary Injunction, they had become his formal accusers due to the entry of their Findings of Fact and Conclusions of Law.

tested and administrative expertise, discretion or fact-finding is involved. *But this court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983.*" *Id.* at p. 574. (Emphasis supplied)

and

"Here the predicate for a *Younger* v. *Harris* dismissal was lacking, for the appellees alleged, and the District Court concluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it. If the District Court's conclusion was correct in this regard, it was also correct that it need not defer to the Board. *Nor, in these circumstances would a different result be required simply because judicial review, de novo or otherwise, would be forthcoming at the conclusion of the administrative proceedings.*" (Emphasis supplied). *Id.* at 577.[14]

In addition, this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) quoted with approval from the lower court "that due process requires an adequate hearing before termination of welfare benefits, and *the fact that there is a later constitutionally fair proceeding does not alter the result.*"

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[14] In like manner, *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Samuels* v. *Mackell*, 401 U.S. 66 (1971) are not applicable because this is a civil and not a criminal proceeding and Dr. Larkin had commenced this action in the federal courts *prior to* the commencement of the contested hearing whereby the appellants sought to suspend his license to practice medicine. As pointed out in *Gibson*, there is no requirement to seek relief in a state forum when a challenge is made against the activities of a state administrative agency.

[*Kelly* v. *Wyman*, 294 F.Supp. 893, 901]. (Emphasis supplied). *Goldberg* v. *Kelly*, 397 U.S. at 261.[15]

Finally, the appellants argue in their brief at 43-50 that Dr. Larkin was not facing irreparable injury and that the record did not support such a finding by the trial court. There is nothing esoteric about the irreparable injury threat to Dr. Larkin and the facts surrounding his

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[15] The court in *Goldberg* noted at footnote 10 at 397 U.S. 263 that in situations where great public harm is imminent rights may be terminated with less due process rights. We submit that with respect to a doctor licensed to practice medicine that the imminent and grave threat to the public would be only that the doctor is not competent to practice medicine and is a danger to the public at large and to his patients in particular. Such would be the case of the doctors who are either drug addicts or alcoholics as presented in the appellants' motion to modify injunction, Document No. S-1. However, Dr. Larkin has never been accused of being incompetent or that his continued practice of medicine endangered the public or his patients. The findings of fact which were made on October 5, 1973 indicate that all allegations against Dr. Larkin had ceased by that date. The alleged use of the name Glen Johnson terminated "on or about April 25, 1972." Findings of Fact, at (3), A. 57. The alleged use of other names by employees of his terminated "on or about May 25, 1973." *Id.* at (4). The alleged fee splitting terminated "on or about February 27, 1973." *Id.* at (5), A. 58. The alleged use of an unlicensed person who engaged in the practice of medicine terminated "on or about February 27, 1973." *Id.* at (6). And the alleged failure to render individual statements terminated "on or about September 30, 1973." *Id.* at (7). Thus, the proposed suspension of the license to practice medicine on October 4, 1973 is in no way related on that date to the protection of the public. In its context, the proposed suspension of the license can only be deemed to be a proposal to punish Dr. Larkin for alleged activities which do not relate to his professional competence. In this context, *Goldberg* does not contemplate the necessity for prompt, swift action with less due process protection than might be necessary were professional incompetence alleged.

irreparable injury are not in dispute. Simply stated, Dr. Larkin was being threatened with a six-month loss of his right to practice medicine in Wisconsin. As stated in the amended complaint at ¶s 3 and 14 and as admitted by the appellants in their answer (A. 18, 19, 60), Dr. Larkin was a physician and surgeon who was duly licensed to practice medicine in the State of Wisconsin and had established offices in Milwaukee, Wisconsin for the purpose of practicing medicine. Dr. Larkin in the fall of 1971 commenced engaging in the practice of medicine in Milwaukee, Wisconsin and his practice included administering abortions. It is the right to practice medicine which was threatened by the Board. If this threat were carried out, Dr. Larkin would not only have suffered irreparable loss of income, but his reputation would have suffered also. Those two conclusions were certainly appropriately made by the lower court. Indeed, this court in *Gibson* v. *Berryhill*, 411 U.S. at 477, Fn. 16 approved of the conclusion of the trial court:

> "That the revocation by the Board of the appellees' licenses to practice their profession, 'together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the appellees for which no adequate remedy is afforded by state law.' "[16]

This case presents a most aggravated attempt to deprive the appellee of due process of law. At the time when the three-judge court entered its preliminary injunction, the

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[16] The appellants' reliance upon *Sampson* v. *Murray*, ... U.S. ..... 39 L.Ed.2d 166 (1974) is misplaced. In *Sampson*, the court found that there was no irreparable injury because Congress had provided for back pay for any civil service employee who was improperly suspended or dismissed. 39 L.Ed.2d at 187. Obviously, Dr. Larkin would suffer irreparable economic injury were his license suspended for six months in addition to damage to his reputation.

appellants in this case had made formal Findings of Fact and Conclusions of Law which resolved every issue in the case against Dr. Larkin. This was done at the conclusion of an *ex parte* hearing. The Board, in that same decision presented the matter to the District Attorney of Milwaukee County with a finding of probable cause that Dr. Larkin had violated the criminal laws of the State of Wisconsin and that his license should be revoked on the basis of their findings of fact. After this decision was made, these appellants then proposed to conduct a so-called Contested Hearing. In that Contested Hearing, the appellants would re-review the evidence and then decide whether the charges which they had previously preferred against Dr. Larkin supported a six (6) month suspension of his license to practice medicine. Thus, the "grand jurors" would become the "petit jurors." None of the other cases which have struck down the mixing of functions in administrative agencies involved such an aggravated fact situation.[17]

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[17] In addition to the cases previously cited in the brief, other cases which have struck down the mixing of investigative, prosecutorial and adjudicatorial functions as being in violation of due process of law are *American Cyanamid Company* v. *FTC*, 363 F.2d 757 (6th Cir. 1966); *Amos Treat & Co., Inc.* v. *SEC*, 306 F.2d 260 (D.C. 1962); *Mack* v. *Florida State Board of Dentistry*, 296 F.Supp. 1259 (S.D. Fla. 1969), aff. and vac'd. 430 F.2d 862 (5th Cir. 1970); *cert. den.* 401 U.S. 954 (1971); *Trans World Airlines* v. *CAB*, 254 F.2d 90 (D.C. 1958); *Texaco* v. *FTC*, 336 F.2d 754, 760 (D.C. 1964) and *Glass* v. *Mackie*, 370 Mich. 482, 122 N.W.2d 651 (1963).

CONCLUSION

On the basis of the foregoing, it is respectfully requested that the Court affirm the judgment of the three-judge district court in this case granting a preliminary injunction.

Respectfully submitted,

ROBERT H. FRIEBERT
Attorney for Appellee

Of Counsel:
SAMSON, FRIEBERT, FINERTY & BURNS
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

No. 73-1573

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,

Appellants,

vs.

DUANE LARKIN, M.D.,

Appellee.

On Appeal from the United States District Court for the Eastern District of Wisconsin.

SUGGESTION OF MOOTNESS OR IN THE ALTERNATIVE MOTION TO RECONSIDER APPELLEE'S MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

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SUGGESTION OF MOOTNESS OR IN THE ALTERNATIVE MOTION TO RECONSIDER APPELLEE'S MOTION TO DISMISS OR AFFIRM

The appellee, Dr. Duane Larkin, by his attorney, Robert H. Friebert, hereby suggests to the Court that the appeal in the above captioned case is moot, or, in the alternative, the appellee moves for reconsideration of his Motion to Dismiss or Affirm. Said motion is based upon the fact that the District Court on July 24, 1974, initially in response to a motion of the appellants and ultimately in re-

sponse to a cross motion by the appellee modified their judgment to state the following:

> "IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18(7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success."

In support of this suggestion of mootness and motion, the appellee submits the following documents:

1. The defendants' Notice of Motion to Modify Injunction dated July 3, 1974;
2. The defendants' Motion to Modify Injunction dated July 3, 1974;
3. The affidavit on behalf of the defendants in support of the Motion to Modify Injunction dated July 2, 1974;
4. The Brief of the defendants in support of Motion to Modify Injunction;
5. The plaintiff's Motion to Modify Injunction dated July 5, 1974;
6. The plaintiff's Brief in Support of Motion to Modify Injunction;
7. The defendants' Reply Brief in Support of Motion to Modify Injunction dated July 10, 1974;
8. The Order of the Court dated July 24, 1974;
9. The Modified Judgment of the Court dated July 25, 1974.

Dated at Milwaukee, Wisconsin this 26th day of July, 1974.

P.O. Address:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

/s/ Robert H. Friebert
Robert H. Friebert

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

NOTICE OF MOTION

TO: Robert H. Friebert
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
Attorney for Plaintiff

PLEASE TAKE NOTICE that the defendants will bring the attached Motion to Modify Injunction on for hearing before the court in the courthouse in Milwaukee at such date and time as shall be set by the court.

Dated at Madison, Wisconsin, this 3rd day of July, 1974.

ROBERT W. WARREN
Attorney General of Wisconsin
/s/ *Le Roy L. Dalton*
Le Roy L. Dalton
Assistant Attorney General
Attorneys for Defendants

P.O. Address:
Room 114 East, State Capitol
Madison, Wisconsin 53702
Telephone: 608-266-3863

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

MOTION TO MODIFY INJUNCTION

TO: The Honorable Myron L. Gordon
United States District Judge
Federal Building
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

COME NOW the defendants, by their attorneys, Robert W. Warren, Attorney General of Wisconsin, and LeRoy L. Dalton, Assistant Attorney General of Wisconsin, and move the court under the authority of Rule 62 (c) of the Federal Rules of Civil Procedure to modify the temporary injunction entered by judgment on January 31, 1974, so that the last phrase of said judgment reads as follows:

> "... that the defendants are preliminarily enjoined until further notice from utilizing the provisions of

§448.18 (7), Wis. Stats., against the plaintiff Duane Larkin, M.D."

Dated at Madison, Wisconsin, this 3rd day of July, 1974.

ROBERT W. WARREN
Attorney General of Wisconsin
/s/ *Le Roy L. Dalton*
Le Roy L. Dalton
Assistant Attorney General
Attorneys for Defendants

P.O. Address:
Room 114 East, State Capitol
Madison, Wisconsin 53702
Telephone: 608-266-3863

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY INJUNCTION

STATE OF WISCONSIN)
) SS.
COUNTY OF WOOD)

John W. Rupel, M.D., being first duly sworn, on oath deposes and says:

(1) That he is the chairman of the Medical Examining Board of the State of Wisconsin and is one of the defendants herein.

(2) That he has supervision of the business and affairs of the Medical Examining Board and is familiar with the files of said Board.

(3) That since the three-judge court gave its oral decision on November 19, 1973, the Medical Examining Board

nas not used the authority of sec. 448.18 (7), Wis. Stats., for the purpose of imposing discipline upon Duane Larkin, M.D., and has not used said statute to discipline any other licensed physician because of the finding by the court and its judgment that said statutory provision is unconstitutional.

(4) That since the oral decision of the court on November 19, 1973, the Medical Examining Board has changed its investigative procedures so that each new case is assigned to one member of the Board to investigate, thereby leaving the remainder of the Board free of any involvement in the investigative process. That the Board has been advised by counsel that it is the opinion of counsel that such separation of functions would permit the remainder of the Board to consider any adjudicatory questions involved in the case without violating the due process rights of any licensee under investigation.

That, however, becauseof the preliminary injunction set out in the judgment enjoining the Board from utilizing the provisions of sec. 448.18 (7), Wis. Stats., the Board has been deprived of a valuable tool in carrying out its supervisory functions in connection with persons licensed to practice medicine in the State of Wisconsin. That if said preliminary injunction applied only to Duane Larkin, M.D., the Board could use the statute in question in appropriate cases where suspension might be justified in order to protect the public interest, especially where the physician involved is having problems with drugs or alcohol, and revocation of the license by action through the office of the district attorney would not be necessary or desirable in the program of rehabilitation of the licensed physician.

(5) That there are pending at this time before the Board three cases where suspension might be appropriate

rather than the more drastic remedy of seeking revocation. In the first case, a podiatrist is apparently the victim of a drug habit and the Board feels that the most appropriate course of action would be to temporarily suspend the doctor's license, thereby cutting off the source of the drugs which he has been obtaining by writing prescriptions for himself, and thereby initiate a program of rehabilitation rather than initiating the more drastic remedy of revocation of the license by an action brought by the district attorney.

(6) That the second case that the Board presently is dealing with, where immediate suspension should be used to protect the public interest, involves alcoholism and failure to diagnose diabetes, emphysema, and arteriosclerotic heart disease. After the local medical society failed in their attempts to have the physician cooperate by receiving medical treatment, his membership in the local society was suspended and the matter referred to the Medical Examining Board. Here again, suspension and proper treatment to rehabilitate the doctor to be a useful member of the medical profession would be the preferable remedy for the Board to use in the interests of protecting the patients and potential patients of this physician rather than resorting to the difficult procedure of revocation where the Board loses its ability to help the physician to become rehabilitated.

(7) The third case presently before the Board, where suspension and rehabilitation appear to be appropriate, involves a physician who is apparently indulging in the drug habit. Again, the Board feels that suspension and rehabilitation of the physician would not only be in the public interest but would also provide an opportunity for the Board to save the professional career of the physician.

(8) This affidavit is made in support of a motion to modify the temporary injunction entered by the court so that it applies only to the plaintiff.

Dated at Marshfield, Wisconsin, this 2nd day of July, 1974.

/s/ John W. Rupel, M.D.
John W. Rupel, M.D.

Subscribed and sworn to before me this 2nd day of July, 1974.

Dorothy Ann Snyder
Notary Public,
Wood County, Wisconsin
My commission 7-31-77

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

BRIEF IN SUPPORT OF MOTION TO MODIFY INJUNCTION

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief brought under the Civil Rights Act. The three-judge district court temporarily enjoined the Medical Examining Board from enforcing sec. 448.18 (7), Wis. Stats., after a hearing on November 19, 1973. Subsequently a written decision was filed on December 21, 1973, and judgment finding sec. 448.18 (7) unconstitutional and ordering "* * * that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats."

The defendants took an appeal from that temporary injunction to the United States Supreme Court and on June

10, 1974, the Supreme Court noted probable jurisdiction. The case is now being briefed and will be set for oral argument late in the year with a decision expected by early 1975.

In the meantime, the Medical Examining Board continues to be enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats.

STATUTORY PROVISIONS

Federal Rule of Civil Procedure 62 (c):

> "Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

ARGUMENT

I. Court Should Modify Preliminary Injunction.

In its decision and also in the judgment the court has held sec. 448.18 (7), Wis. Stats., unconstitutional and has in the judgment prohibited the defendants from further use of the provisions of sec. 448.18 (7), Wis. Stats. Thus, the Medical Examining Board has been thwarted in the use of the above statute in cases where its use could be of considerable value in protecting the interests of the people of the State of Wisconsin who receive medical services from

licensed physicians and at the same time allow the Board to use the suspension device for rehabilitation of licensed physicians who have stepped out of line.

The affidavit of Dr. John W. Rupel attached to the motion indicates that the Medical Examining Board is operating under procedures at this time which do not result in the mixing of investigative and adjudicative functions in the same person or persons. It is possible, therefore, to use the suspension statute without violating procedural due process of a licensee. The *Larkin* case was, of course, on its facts unique in that the Board investigated charges and then proposed to hold a contested hearing on those charges. Under their present operating procedure the person who supervised the investigation would not be a part of the adjudicative decision and therefore the most important shortcoming cited in the *Larkin* case would not be present.

II. The Court Should Not Have Declared The Statute Unconstitutional.

A three-judge court on a mere motion for a preliminary injunction lacks authority to declare a state statute unconstitutional. The United States Supreme Court unanimously so held in *Mayo* v. *Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774. In reversing the judgment therein, the court, after pointing out that the lower court had declared a state statute unconstitutional, wrote (309 U.S. at 316):

> "We think the court committed serious error in thus dealing with the case upon motion for temporary injunction. The question before it was not whether the act was constitutional or unconstitutional; was not whether the Commission had complied with the requirements of the act, if valid, but was whether the showing made raised serious questions, under the

Federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants."

It is obvious that the judgment in connection with the preliminary injunction should relate solely to the plaintiff Larkin and that the declaration of unconstitutionality of the statute involved was premature and should now be corrected.

III. Preliminary Injunction Should Be Stayed As To All But Plaintiff.

The defendants have no objection that the preliminary injunction stays in effect as to Dr. Larkin. However, Dr. Rupel's affidavit clearly shows that irreparable injury is resulting to the state and its citizens by the denial of the use of sec. 448.18 (7), Wis. Stats., in appropriate cases where no mixing of functions takes place.

CONCLUSION

It is respectfully concluded that the court should modify the judgment entered on January 31, 1974, so that the defendants are preliminarily enjoined from utilizing sec. 448.18 (7), Wis. Stats., against only the plaintiff Duane Larkin, M.D.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

MOTION TO MODIFY INJUNCTION

The plaintiff Duane Larkin, M.D. by his attorney Robert H. Friebert hereby moves the Court for the entry of an order modifying the preliminary injunction and judgment dated January 31, 1974 to state the following:

> "It is ordered and adjudged that the defendants are preliminarily enjoined until further notice from utilizing the provisions of Sec. 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer immediate and irreparable injury, loss and damage if this statute were to be applied against him in that he would be deprived of his right to practice medicine and his reputation in the community would be irreparably injured, and the defendants would not in any way be prejudiced and, further on the grounds that the plaintiff's challenge to the constitutionality of Sec. 448.18 (7), Wis. Stats. has a high likelihood of success in this case."

Dated at Milwaukee, Wisconsin this 5th day of July, 1974.

P.O. Address:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

/s/ *Robert H. Friebert*
Robert H. Friebert

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

BRIEF IN SUPPORT OF MOTION

The defendants have moved to modify the injunction in the above captioned case dated January 31, 1974. The plaintiff has no objection to modifying this judgment, but believes that the changes should be more inclusive than that proposed by the defendants.

As the Court is aware, the United States Supreme Court has noted probable jurisdiction in this case. The defendants herein, claim, *inter alia,* that this Court's decision and injunction was improper because it declared the statute unconstitutional at a preliminary hearing stage and, further because this Court made no specific finding of irreparable injury. The motion to dismiss or affirm, filed by the plaintiff in the United States Supreme Court stated, *inter alia,* that these objections on their part were hypertechnical and that if the defendants felt that they were harmed they were free to petition the Court for clarification.

Now that they have so petitioned the Court, we believe that the decision of the Court ought to be amended to avoid

all of their hypertechnical objections and therefore propose the amendment as contained in the motion.

The affidavit and brief in support of the motion of the defendants is very interesting. They note that the Board has established a new procedure whereby one member investigates and the other members will decide the case. Howver, it is clear from these documents that the Board has already made up its mind with respect to the results of the inquiry involving those three other persons because Dr. Rupel's affidavit at Paragraphs (5), (6) and (7) indicates the decision of the Board. Furthermore, it is clear that the Board is extremely solicitous with respect to a doctor and a podiatrist who are addicted to drugs and with respect to a doctor who is an alcoholic and is unable to properly diagnose diseases. The Board in those instances is interested in rehabilitation and presumably interested in preventing notoriety as part of the rehabilitation program since it appears that it would be difficult to save these persons if their various drug habits became public information. On the other hand, the Board was not as solicitous in "rehabilitating" Dr. Larkin for the "heinous" alleged activities of using a false name, fee splitting, etc. Apparently, a nonaddicted, nonalcoholic physician who administers abortions is beyond rehabilitation.

In any event, we have no objection to amending the judgment as outlined in the plaintiff's motion. However, we do object to the partial amendment as contained in the defendants' motion.

Dated at Milwaukee, Wisconsin this 5th day of July, 1974.

/s/ *Robert H. Friebert*
Robert H. Friebert

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION TO MODIFY INJUNCTION

In response to the motion filed by the defendants requesting the court to modify the preliminary injunction and judgment dated January 31, 1974, the plaintiff has also filed a motion to modify the injunction, apparently agreeing with the proposal submitted by the defendants but in addition requesting that the modified judgment specify various grounds not previously included in the judgment.

The defendants have specified by affidavit and brief in support of motion the reasons why they are requesting the court to modify the injunction so that it applies only to the use of sec. 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D. These reasons include the fact that the Medical Examining Board has cases where it would be more appropriate to consider a suspension of the physician's license rather than to seek its permanent revocation. It is clearly set out that the Board has been hampered in its statutory duties by not being able to use sec. 448.18 (7), Wis. Stats., against licensees in appropriate circumstances.

Apparently plaintiff does not object to the modification of the injunction so as to permit the Board to use the statute in question in its overall supervision of the licensed medical profession.

The plaintiff, however, thinks this would be a good time to get rid of what are termed "hypertechnical objections" which are now present in the case pending before the United States Supreme Court. Plaintiff therefore suggests the additional language found in his motion dealing with irreparable injury to reputation and that plaintiff's challenge to the constitutionality of the statute in question has a high likelihood of success.

The plaintiff is obviously, by suggesting this addition to the judgment, attempting to obviate several issues which are presently pending in the United States Supreme Court. It is the defendants' position that these issues should be resolved in the United States Supreme Court and that this court should merely modify the injunction to permit use of the statute under appropriate circumstances.

We think, therefore, that the judgment should be modified to the extent that the Medical Examining Board is enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats., only against Duane Larkin, M.D.

Dated at Madison, Wisconsin, this 10th day of July, 1974.

Respectfully submitted,
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/s/ *Le Roy L. Dalton*
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

ORDER

The parties have filed motions to modify certain language in the judgment of this three-judge court dated January 31, 1974. See Rule 62(c) Federal Rules of Civil Procedure. They agree that the judgment should be modified to provide that the defendant medical examining board be enjoined from utilizing the provisions of § 448.18 (7), Wis. Stats., only against the plaintiff, Duane Larkin, M.D.

In addition, the plaintiff requests that the modified judgment should recite specific grounds not previously included in the judgment but contained in the earlier memorandum decision of this court. See *Larkin* v. *Withrow*, ... F. Supp. ..... (E.D. Wis. No. 73-C-360, decided November 19, 1973). We conclude that the plaintiff's position is well taken. See *Schmidt* v. *Lessard*, 414 U.S. 473 (1974).

Therefore, IT IS ORDERED that the judgment of this court dated January 31, 1974, be and hereby is modified so that said judgment reads as follows:

> IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success.

Dated at Milwaukee, Wisconsin, this 24th day of July, 1974.

/s/ *F. Ryan Duffy*
F. Ryan Duffy, U.S. Circuit Judge

/s/ *John W. Reynolds*
John W. Reynolds, U.S. District Judge

/s/ *Myron L. Gordon*
Myron L. Gordon, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

vs.

HAROLD WITHROW, D.O., et al.,

MODIFIED JUDGMENT

This action came on for (hearing) before the Court, Honorable F. Ryan Duffy, Senior Circuit Judge, John W. Reynolds, Chief District Judge, and Myron L. Gordon, District Judge, United States Judges presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the preliminary injunction and judgment dated January 31, 1974, be and hereby is modified, pursuant to Rule 62(c), Federal Rules of Civil Procedure, so that said judgment reads as follows:

> IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on

the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success.

APPROVED:

F. Ryan Duffy
John W. Reynolds
Myron L. Gordon

Dated at Milwaukee, Wisconsin, this 25th day of July, 1974.

Ruth W. LaFave
Clerk of Court

Respectfully submitted,

ROBERT H. FRIEBERT
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